Fred Meyer Stores, Inc. *and* United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union. Case 36–CA–010555

June 18, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit.[1] The issues are whether representatives of United Food and Commercial Workers International Union and Local No. 555 (collectively the Union) lost the protection of the Act when eight of them visited the Respondent's Hillsboro, Oregon facility to talk to unit employees on the selling floor, and whether the Respondent unlawfully told those union representatives not to speak with employees on the selling floor, only in the breakroom. In light of the court's decision, which we accept as the law of the case, and for the reasons set forth below, we find that the Union's representatives forfeited the protection of the Act and that the Respondent did not violate the Act by telling the union representatives to speak with employees only in the breakroom. We therefore dismiss the complaint.[2]

On April 30, 2015, the Board issued a Decision and Order in this proceeding.[3] Affirming its earlier findings in a 2012 decision,[4] the Board found that the Respondent violated Section 8(a)(5) and (1) by unilaterally limiting the rights of representatives of the Union, as established in the visitation provision of the parties' collective-bargaining agreement and through past practice, to interact briefly with unit employees on the selling floor. The Board further found that the Respondent violated Section 8(a)(1) by telling the employees not to speak to the union representatives, disparaging the Union in the presence of employees, threatening to have union representatives arrested, and causing the arrest of three union representatives.[5] On August 1, 2017, the court reversed some of these findings and remanded certain issues to the Board, stating that the Board "ha[d] not adequately considered the issues raised by the parties."[6] Specifically, the court reversed the Board's findings that the Respondent unlawfully threatened with arrest and caused the arrest of union representatives and disparaged the Union.[7] The court remanded the issues whether the Respondent violated the Act by unilaterally changing the visitation policy[8] and by telling union representatives not to talk with employees outside of the employee break room. The court found that the Board erred by concluding that the visitation policy does not limit the number of union representatives that may visit a store at a given time. The court also found that the Board did not adequately consider a heated exchange between the union representatives and the manager on duty.[9]

On November 1, 2017, the Board notified the parties that it had accepted the court's remand and invited them to file position statements addressing the issues raised in the court's opinion. The General Counsel filed a position statement.

Facts

The Respondent operates a 3.7-acre big box store in Hillsboro, Oregon, near Portland. For many years, the Union has represented the Respondent's employees in Grocery, Checkout, Meat, and Non-food units. For at least 20 years, the parties' collective-bargaining agreements contained a visitation provision that stated:

> It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore, representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

[1] *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630 (D.C. Cir. 2017).

[2] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[3] 362 NLRB 698 (2015).

[4] 359 NLRB 316 (2012), vacated and set aside pursuant to *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

[5] 362 NLRB at 700-701.

[6] 865 F.3d at 639.

[7] 865 F.3d at 639, 641. As discussed further below, the court did not expressly reverse the Board's finding that the Respondent violated Sec. 8(a)(1) when its manager on duty, Jim Dostert, told employee Alicia England not to speak to union representative Jenny Reed.

[8] The court framed the issue on remand as "whether the union representatives lost the protection of the Act." *Fred Meyer Stores*, 865 F.3d at 637–638. However, the unfair labor practice issue is an 8(a)(5) issue: whether the Respondent, by its conduct on October 15, 2009, unilaterally changed the parties' visitation agreement and past practice regarding union access to employees on the selling floor. If the union representatives' conduct exceeded the scope of that agreement and past practice—i.e., if those representatives "lost . . . protection"—the Respondent did not violate Sec. 8(a)(5).

[9] 865 F.3d at 639.

In 2002, the Union endorsed a memo issued by Safeway, whose employees it also represents, that established the following store visitation practice:

> UFCW 555 Business A[g]ents are in our stores frequently, and especially now, during the [U]nion's elections and because of the lengthy Eugene and Salem area negotiations.
>
> Business agents in our stores have certain rights and obligations, as do we during their visits. Unfortunately, there have been a number of confrontations between store managers and business agents during the past few weeks. THE PURPOSE OF THIS MESSAGE IS TO EXPLAIN WHAT CONDUCT IS ACCEPTABLE—BY THEM AND BY US.
>
> Business agents have the right to talk BRIEFLY with employees on the floor, to tell those employees they are in the store, to introduce themselves, and to conduct BRIEF conversations, as long as the employees are not unreasonably interrupted. Such conversations should not occur in the presence of customers.
>
> Business Representatives have the right to distribute fliers to employees on the floor AS LONG AS IT IS DONE QUICKLY, THE EMPLOYEES ARE NOT URGED TO STOP WHAT THEY ARE DOING TO READ THE MATERIALS AT THAT TIME, AND FURTHER THAT THE MATERIALS ARE NOT PASSED OUT IN THE PRESENCE OF CUSTOMERS.
>
> Business agents have the right to distribute materials in the break room. Lengthy conversations and discussions should always take place in the break room….

The Respondent and the Union adhered to the foregoing visitation practices at the Hillsboro store. Union representative Mary Spicher, who serviced the unit employees at that store from March 2008 through November 2009, testified that on numerous occasions she visited those employees alone or accompanied by another union representative.[10]

By October 2009, the Respondent and the Union had been engaged for more than a year in multi-employer negotiations for a successor collective-bargaining agreement, and the Union requested the assistance of the International Union in revitalizing support for its bargaining proposals among unit employees. On October 14, following a heated exchange with a union representative who threatened to return the following day with "15 or 20 more people," the Respondent's Store Manager at Hillsboro, Gary Catalano, telephoned the Regional Human Resource Office seeking advice on how to handle the situation. Catalano was advised to reiterate the parties' visitation policy to the union representatives, allow them to remain in the store as long as they were not disruptive, ask them to leave if they became disruptive, call store security as well as regional management if they refused to leave, and then contact the police.[11] That evening, Catalano shared these instructions with department managers and, knowing that he would not be at the store the following day, designated Home Department Manager Jim Dostert to be the "manager on duty" during his absence.

On October 15, eight union representatives, led by Jenny Reed from the International Union and Brad Witt from Local 555, carpooled to the Hillsboro store bearing copies of a petition in support of the Union's healthcare proposal. As required under the visitation provision of the parties' agreement, Reed and Witt went to the customer service desk to check in with the store manager; the other union representatives fanned out in pairs to talk to employees and solicit signatures for the petition. After a 5-minute wait, Dostert appeared at the customer service desk. Following introductions, Reed and Witt stated that the union representatives were there to talk to unit employees, and Dostert responded that they must limit their contact to identifying themselves and that all further communication must take place in the break room.[12]

A heated exchange among Reed, Witt, and Dostert ensued, during which Dostert telephoned the Respondent's Vice President of Labor Associate Relations, Cynthia Thornton, who advised Dostert to explain the visitation policy to the union representatives. Meanwhile, Reed approached cashier Alicia England, and Dostert yelled to England not to talk to Reed. Dostert also angrily disparaged the Union, stating among other things that union representatives are jerks, unions are outdated and ridiculous, and union dues are ridiculous. Dostert learned that other union representatives were in the store and called Loss Prevention (Security) Manager Mike Kline, who explained the Respondent's trespass rules, asked Reed and Witt to leave, and called the police when they re-

[10] As found by the administrative law judge and the court, the parties have allowed union representatives to have conversations with employees on the sales floor so long as the employees were not assisting store customers at the time, and the conversations were kept to a reasonable length, usually "a minute or two or possibly longer depending on the circumstances." The judge found that the parties did not have a clearly defined limit with regard to the number of union agents permitted to be in a store at any one time, but noted that, in practice, one or two agents would visit a store at a given time. 359 NLRB at 334.

[11] 359 NLRB at 326.

[12] This statement of facts is based on the judge's lengthy analysis of credibility in light of Reed's and Dostert's demeanor, Dostert's same-day report, and Witt's contemporaneous notes. 359 NLRB at 336-338.

fused. The police arrived, gave Reed and the other union representatives opportunities to leave the premises, and arrested Reed and two other union representatives when they did not.

Analysis

When employees and/or their exclusive collective-bargaining representative exercise rights embodied in their collective-bargaining agreement, the exercise of those rights is protected. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984); *The Pittsburg & Midway Coal Mining Company*, 355 NLRB 1210 (2010), enfd. sub nom. *Chevron Mining Inc. f/k/a The Pittsburg & Midway Coal Company v. NLRB*, 684 F.3d 1318 (D.C. Cir. 2012). Not so, however, when the conduct of the bargaining representative exceeds the scope of those rights. That is what happened here. Although the parties' contractual visitation provision did not set a ceiling (or floor) on the number of union representatives that could visit a store simultaneously, the substance of their agreement regarding union access also included their past practice over the course of years, which established that visitations would be limited to one or two union representatives at a time. Accordingly, on October 15, when the Union entered the Respondent's premises with a group of eight representatives, it departed dramatically and, we find, unreasonably from established past practice and breached the visitation policy ab initio. By this conduct the union representatives forfeited the protection of the Act before Dostert even spoke. Cf. *The Pittsburg & Midway Coal Company*, 355 NLRB at 1211-1213 (finding no loss of protection in calling "memorial day" work stoppages where union's conduct did not violate the collective-bargaining agreement or past practice). Additionally, the union representatives who fanned out on the selling floor did so for the purpose of soliciting employees' signatures on a petition—a process that could arguably take more than two minutes and, therefore, necessitate that they do so in the breakroom. Based on the above, and given the court's findings, we conclude that the Respondent did not violate Section 8(a)(5) and (1) by directing the union representatives to leave the premises or Section 8(a)(1) by telling them to speak to employees in the breakroom. Accordingly, we shall vacate the Board's Decision and Order in Case 36–CA–010555 and dismiss the complaint.[13]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 18, 2019

_____

John F. Ring, Chairman

_____

Marvin E. Kaplan, Member

_____

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[13] As alluded to above, the court did not expressly reverse the Board's finding that Dostert violated the Act by telling employee England not to speak to Reed. Given the breadth and bases of the court's reversals, however, we believe its reversals encompass this finding. In any event, in the context of the Union's breach of the visitation policy and practice, we find that Dostert's directive to England was not unlawful.